IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1364

JOAN RUDOLPH,
Petitioner,

v.

WAGNER ELECTRIC CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

LISA S. VAN AMBURG
705 Olive Street, Suite 924
St. Louis, Missouri 63101
Counsel for Petitioner

March 2, 1979

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Petitioner Joan Rudolph prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on November 8, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals, reported at 586 F.2d 90, is attached to this Petition as Appendix A. The Order of the Court of Appeals denying rehearing, entered

on December 5, 1978, is attached to this Petition as Appendix B. The Judgment and Memorandum of the District Court below is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1978. A timely Petition for rehearing was denied on December 5, 1979 and this Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Supreme Court's ruling in *Electrical Workers, Local 790 v. Robbins & Meyer, Inc.*, with respect to tolling during the pendency of a collective bargaining agreement's grievance mechanism should be applied retroactively to Petitioner.

2. Whether Rudolph's discharge was the final occurrence for purposes of the statutory time limit.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000e-5(e).

> (e) **Time for Filing Charges.** A charge under this Section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred. . . .

STATEMENT OF CASE

Joan Rudolph was employed by Wagner Electric Corporation as a clerk-stenographer from December, 1951 to February, 1973 when she was discharged allegedly for "insufficient productivity". Pursuant to the labor agreement entered into between the company and Local 1104, International Union of Electric, Radio and Machine Workers, AFL-CIO, of which Petitioner was a member, she filed a union grievance on her discharge in February of 1973, protesting her discharge on the ground that there was not "cause" therefor as required by Article 5 of the aforementioned agreement. Her grievance was processed through the pre-arbitration steps set out in Article 3 of said agreement, and, no settlement being reached, she requested by and through her union representative that the grievance be submitted to arbitration. The arbitration was heard December 18-20, 1973 and on April 22, 1974, the arbitrator upheld Miss Rudolph's termination.

On May 15, 1974, 23 days after the arbitrator's decision was handed down, Rudolph filed a charge against Wagner Electric Corporation with the Equal Employment Opportunity Commission, alleging sex discrimination in employment. The EEOC investigated the charge, found reasonable cause to believe that discrimination did occur; determined that "the timeliness and all other jurisdictional requirements have been met" (Determination, Case No. TSL4-2044), and issued a "right to sue" letter on January 7, 1977. Ms. Rudolph then initiated this lawsuit under 42 U.S.C. Section 2000e-5 on March 28, 1977.

The Company's answer to Ms. Rudolph's Complaint stated that "the same issue of alleged sex discrimination presented herein was raised and considered in the arbitration proceedings." On November 16, 1977, nine months after the filing of

this action, the Company filed its Motion for Summary Judgment Dismissing the Complaint. The District Court dismissed this action on February 1, 1978, citing Rudolph's failure to file her charge within 180 days of the discharge and citing the recent Supreme Court's opinion of *Electrical Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), for its holding that the 180 day statute of limitations is not tolled during the pendency of the grievance-arbitration proceedings.

On November 8, 1978, the Court of Appeals affirmed the dismissal of the suit. On the issue of applying *Electrical Workers* retroactively to Ms. Rudolph, the Court of Appeals applied the standards set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and concluded that those standards would be better served by applying the *Electrical Workers* rule retroactively. Judge Hanson, in a concurring opinion, would not have predicated the decision on an independent review of the *Chevron* standards, but would have followed inferences gained from the rationale employed by the Supreme Court in *Electrical Workers*.

REASONS FOR GRANTING THE WRIT

Introduction and Summary

The issue of retroactivity of the *Electrical Workers'* decision is an important one in that it reflects a confused area of the law productive of differing judicial responses. Many Title VII litigants such as Petitioner are deprived of a federal remedy for discrimination because at the time of their discharge they were encouraged by the Federal Judiciary to pursue grievance or arbitration procedures prior to filing their charges with the EEOC. Prior to the Supreme Court's rulings in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which signalled the no-tolling holding of *Electrical Workers*, with few exceptions the Federal Courts that had occasion to address the issue concluded that the filing of a labor grievance procedure did toll the filing time requirements of Title VII. Not only was the tolling principle alive and well at the time of Ms. Rudolph's discharge, but also the Federal Judiciary regarded Title VII rights and union contractual rights as interrelated. Consequently, in applying the criteria of *Chevron v. Huson, supra*, so as to deprive Petitioner of a federal remedy for sex discrimination, the Court of Appeals has resolved this issue in a manner directly in conflict with the policy of Title VII in favor of airing employment discrimination grievances.

I

The Holding of the Court of Appeals That "No-Tolling Principles" Which Evolved Subsequent to Petitioner's Discharge Should Be Retroactively Applied Deprives Petitioner and Other Litigants of a Substantial Federal Remedy and Creates Confusion in an Area of Federal Law Productive of Differing Judicial Responses.

1. At the time of Ms. Rudolph's discharge, almost all previous authority had held that the pursuit of arbitration pursu-

ant to a collective bargaining agreement tolled the limitation period specified in Title VII of the Civil Rights Act of 1964. E.g. *Sanchez v. T.W.A.*, 499 F.2d 1107 (10th Cir. 1974); *Moore v. Sunbeam Corporation*, 459 F.2d 811; 826-27 (7th Cir. 1972); *Malone v. North American Rockwell Corporation*, 487 F.2d 779 (9th Cir. 1972); *Culpepper v. Reynolds Metal, Inc.*, 421 F.2d 888 (5th Cir. 1970).

With respect to the issue of the relationship between contractual rights to non-discrimination and Title VII rights, at the time of Ms. Rudolph's discharge, the status of the law encouraged Petitioner to proceed with labor arbitration procedures prior to filing with the EEOC. The case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965) stood for the proposition that contractual remedies through arbitration should be pursued fully before resort to federal courts on federal remedies. The Court of Appeals acknowledges that Ms. Rudolph, in first pursuing her grievance through arbitration was following the then established "rules of shop". 586 F.2d 90 at 95. The district court in *Dewey v. Reynolds Metals Company*, 291 F. Supp. 786 (W.D. Mi., 1969) addressed the issue with the following language:

> "It is understandable that any union member would *first* proceed to raise any rights he felt were due him under the contract—Proceeding *first* therefore through arbitration is in accord with the federal labor law. Plaintiff should not be penalized for *first* proceeding with his contractual remedies through arbitration process, *as preferred and indeed mandated* by federal law. He should retain his rights to also bring a civil rights (Title VII) action.
>
> *Emphasis added.* 291 F. Supp. 786, 789.

The Fifth Circuit Court of Appeals in *Culpepper v. Reynolds Metals, Inc.*, 421 F.2d 888 (5th Cir. 1970) found support in the *Dewey* court's reasoning in announcing the tolling principles relied upon by Ms. Rudolph.

In applying the *Chevron* standards regarding retroactivity to Petitioner, the Court of Appeals reached a completely different result than the district court in *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976). In *Woods*, the Plaintiff was discharged on June 28, 1974; filed a union grievance on July 2, 1974; arbitration found against plaintiff on December 4, 1974 and on December 30, 1974, plaintiff *Woods* filed the EEOC charge. Judge Mehrige applied the *Chevron* Standards in holding that Woods' Complaint was not time barred although 203 days had elapsed between the discharge and filing of the charge. He states:

> "Since (1) all previous authority on the issue had held that the pursuit of arbitration pursuant to a collective-bargaining agreement does toll the limitations period specified in Title VII, (2) the Plaintiff would be clearly prejudiced by retroactive application, as his claim would be lost, and (3) Title VII evinces a strong policy in favor of airing grievances, this Court is satisfied that the *Johnson* principles as applied in the instant case should be given prospective effect . . .
>
> 420 F. Supp. 35 at 41.

Judge Mehrige's decision against plaintiff *Woods* on the merits was subsequently affirmed by the Fourth Circuit Court of Appeals without comment on the precedural ruling. *Woods v. Safeway Stores, Inc.*, 579 F. 2d 43 (4th Cir. 1978). It is important to note however, that the District Court in *Woods* reached an opposite conclusion regarding retroactivity of the no-tolling principle. Judge Mehrige's conclusion is more in line with the federal law at the time of Rudolph's discharge and more faithful to the policy of Title VII.

2. The Court of Appeals misconstrued the holding of the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, (1971) in its application of the standards regarding retroactivity.

The Court erroneously reasoned that because the Eighth Circuit had not ruled directly on the tolling issue at the time of Rudolph's discharge, there was not clear precedent on which Rudolph may have relied. See *Rudolph v. Wagner Electric Corp.*, 586 F. 2d 90, 92. However, the court failed to consider that *Electrical Workers* dealt with an issue of first impression whose resolution was not clearly foreshadowed at the time of Rudolph's *discharge*, thus satisfying the alternate clause in he first *Chevron* standard:

> First, the decision to be applied retroactively must establish a new principle of law, either by overruling clear past precedent . . . or *by deciding an issue of first impression whose resolution was not clearly foreshadowed.*
>
> Emphasis added 404 U.S. at 106-07.

Both the Supreme Court in *Electrical Workers* and the Eighth Circuit Court of Appeals cite *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974) and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) as cases which foreshadowed the no-tolling ruling in *Electrical Workers*. Ms. Rudolph did not have the benefit of those two decisions at the time of her discharge. Even if she had, she would have been encouraged by the language in *Alexander* to proceed exactly as she did. The Supreme Court in *Alexander* recognized that Title VII's policy favoring voluntary compliance with employment discrimination laws was furthered by proceeding *first* through arbitration. The Court noted that a rule requiring courts in Title VII lawsuits to defer to arbitration results:

> "might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the abitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less" (415 U.S. at 57).

Consequently, the Court declared "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue *fully* both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII" (Id., at 59-60) and held "that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration under the non-discrimination clause of a collective-bargaining agreement." (Id., at 49, emphasis added).

At the time of Plaintiff's discharge, the status of the law was reflected in the district court decision of *Alexander v. Gardner Denver Company*, 346 F. Supp. 1012 (D. Colorado 1971), subsequently affirmed by the Court of Appeals in 1972, 466 F.2d 1209 (1972), and not yet reversed by the Supreme Court in 1974. Had Rudolph filed her EEOC charge concurrent with the grievance-arbitration as suggested by the Court of Appeals, she may have jeopardized the outcome of the arbitration. The District Court in *Alexander* addresses the issue in quoting the following language from *Culpepper v. Reynolds Metals Company*, 421 F.2d 888 at 891-92 (5th Cir. 1970):

> We do not think that Congress intended for a result which would require an employee, thoroughly familiar with the rules of shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rules of the shop *or to do so simultaneously, thereby frustrating the grievance procedure. Emphasis added.*

The District Court in *Alexander* further embraces Judge Weick's reasoning in *Dewey v. Reynolds Metal Company*, 429 F.2d 324 (6th Cir. 1970), in holding that when a collective-bar-

gaining agreement such as Rudolph's contains a grievance arbitration procedure, that procedure had to be exhausted before recourse is had to the Courts. 346 F. Supp. 1012 at 1019. The District Court in *Alexander* further endorsed Judge Weick's distinction of *Culpepper* in quoting the following language:

> The case of *Culpepper v. Reynolds Metals Co.*, 421 F. 2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In *Culpepper*, however, only a grievance was filed, which was never processed through arbitration. See 346 F. Supp. 1012 at 1017.

The Court of Appeals in retrospect failed to consider that Rudolph's option to pursue her EEOC charge and her grievance-arbitration simultaneously was foreclosed by the federal judiciary's interpretation of the law at the time of her discharge.

To view the legislative history of Title VII at the time of Petitioner's discharge as clear on the issue of tolling, as did the Court of Appeals herein, is a misperception of history. More importantly, the Court of Appeals imposed upon Petitioner a stricter standard than contemplated by the *Chevron* court, in finding that because Rudolph was not *prevented* from filing her charge concurrent with pursuing her grievance, she should be foreclosed from pursuing her Title VII claim at all. 586 F.2d 90, 93. Such reasoning totally ignores the fact that federal labor law as well as Title VII law actively encouraged her to proceed *first* through arbitration of her contractual remedy.

The Court of Appeals further misconstrued the Second of the *Chevron* criterion:

> "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its application." 404 U.S. at 106-107.

The history of the no-tolling rule announced in *Electrical Workers* post-dates Rudolph's discharge. The purposes of the rule and in fact the rationale behind any limitation period are in fact satisfied by prior resort to arbitration because the employer has been put on notice of the claim and may take steps to preserve his case. The Court of Appeals held that the purpose of the *Electrical Workers* no-tolling rule was to further the legislative intent of the Act by reaffirming the independence of contractual rights under a collective bargaining agreement and Title VII. 586 F.2d at 94. *However*, at the time of Rudolph's discharge, the federal courts saw *no inconsistency at all* between tolling principles and the principle of independence of contractual rights and Title VII rights. The two went hand-in-hand, as evidenced in the language of *Dewey v. Reynolds Metals, supra; Alexander v. Gardner Denver Co., supra,* and *Culpepper v. Reynolds Metal Co., supra.* Consequently, the meaningful purpose of the no-tolling rule in *Electrical Workers* is to discourage litigants from "sleeping on their rights"; the same purpose which underlies statutes of limitation. Petitioner Rudolph cannot be accused of having slept on her rights when she pursued her grievance first through arbitration. She proceeded in a manner encouraged at the time by Federal Labor law as well as Title VII law.

The inequity of the decision of the Court of Appeals in denying Rudolph access to federal courts on her Title VII claim far outweighs the inequity of prospective application to the company. The plain and simple reality is that she could not reasonably have foreseen the death of the no-tolling rule at the time of her discharge. The *Chevron* Court, in enunciating the three criterion for applying civil rules prospectively, embraced the principle that the Court should not "indulge in the fiction that law new announced has always been the law, and therefore, that those who did not avail themselves of it waived their right." *Griffin v. Illinois*, 351 U.S. 12, 26 (1956).

In sum, the holding of the Court below that the no-tolling rule of *Electrical Workers* should be applied retroactively to petitioner is unfaithful to the policies of Title VII; reflects a confused area of the law productive of differing judicial responses; and is premised upon a misunderstanding of the Supreme Court ruling in *Chevron v. Huson Oil Co., supra.* This result affects many Title VII litigants who in good faith proceeded as did petitioner through arbitration before filing their EEOC charges, and prevents them from purusing their claims in federal courts. Consequently, the issue is one of great importance and this Court should grant certiorari to resolve this inequity.

II

The Holding of the Court of Appeals That Rudolph's Discharge Was the Occurrence for Purposes of the Title VII Limitations Period Is Contrary in Principle to the Status of Labor Law at the Time of Rudolph's Discharge.

The Court of Appeals erroneously held that Rudolph's argument that the arbitrator's decision was the "occurrence" for purposes of Section 2000e-5(e) was rejected by the Supreme Court in *Electrical Workers.* However, Rudolph distinguishes her fact situation from that in *Electrical Workers* by having pursued the grievance fully to the point of arbitration. The distinction is important because at the time of Rudolph's discharge, a grievance procedure had to be *exhausted* before recourse could be had to the courts. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); and *United Steelworkers Trilogy,* 363 U.S. 564 (1960). The *Steelworkers Trilogy* stands for the proposition that the purpose of arbitration is thwarted if the awards are held by the courts to be binding only upon employers and not employees.

Under the system of arbitration erected by the parties, date of discharge did not mark the termination of the employee's contractual ties to her job. However, final-sounding the label "discharge", the parties have contractually erected a system of industrial self-government under which the decision is not final until the arbitrator finds that the discharge was for "just cause". In sum, the Company's initial declaration that Rudolph was "discharged" is not, by its own force a "final determination". Rudolph retained her ties to the work-place until the grievance-arbitration process was resolved unfavorably to her. Only then could she assess whether the final resolution is one which violated her rights under Title VII and thus warranted resort to statutory procedures. Consequently, the date of the arbitrator's decision should be viewed as an "occurrence" within the meaning of Section 706(e) of 42 U.S.C. 2000*e*.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

LISA S. VAN AMBURG
705 Olive Street, Suite 924
St. Louis, Missouri 63101
Attorney for Petitioner

March 2, 1979

APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 78-1193

Joan Rudolph,
Appellant,

v.

Wagner Electric Corporation,
Appellee.

} Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 15, 1978

Filed: November 8, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and HANSON,* Senior District Judge.

STEPHENSON, Circuit Judge.

Appellant Joan Rudolph brought a Title VII sex discrimination claim, Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e et seq., against appellee Wagner Electric Corporation. Upon Wagner's motion, the district court[1] granted summary

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* The Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

judgment, dismissing the complaint upon the ground that it failed to meet the time limitation jurisdictional prerequisite of 42 U.S.C. § 2000e-5(e). Rudolph appeals, alleging her claim was timely filed. We affirm the district court.

Rudolph was dismissed from her job with Wagner in February 1973 for "insufficient productivity." Pursuant to the labor contract entered into between Wagner and Local 1104, International Union of Electric, Radio and Machine Workers, AFL-CIO, of which Rudolph was a member, she filed a union grievance in February 1973 protesting that there was not "cause" for discharge as required by the labor contract. The resolution of the dispute was submitted to arbitration in December 1973 and on April 22, 1974, the arbitrator upheld Rudolph's dismissal on the basis of insufficient productivity. On May 15, 1974, Rudolph filed a charge against Wagner with the Equal Employment Opportunity Commission (EEOC), alleging sex discrimination by Wagner. On January 10, 1977, Rudolph received her right to sue letter from the EEOC and on March 28, 1977, she filed suit in district court, alleging that Wagner violated various provisions of Title VII, including failure to remedy the effects of all the discriminatory practices alleged. The district court dismissed Rudolph's action for her failure to file her charge within 180 days of her discharge as required by 42 U.S.C. § 2000e-5(e): "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * *."

Rudolph claims on appeal that the arbitrator's decision, issued pursuant to the contractual labor agreement, upholding the discharge, is the "occurrence" for purposes of section 2000e-5(e), and thus her claim was filed within 180 days of the occurrence. This argument has implicitly been rejected by this court,[2] and

[2] *See Greene v. Carter Carburetor Co.*, 532 F.2d 125, 126 (8th Cir. 1976); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975).

has specifically been rejected by the Supreme Court in *International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 234-35 (1976).

Rudolph alleges her fact situation can be distinguished from *Electrical Workers* primarily because Rudolph considered the arbitration decision to be the final disposition, and thus the "occurrence," and she did not consider the February 1973 discharge as final. However, this claim amounts to no more than the bare assertion raised by plaintiffs in *Electrical Workers*. There the Court stated:

> Throughout the proceedings both in the District Court and in the Court of Appeals, both sides appear to have assumed, as did the courts, that the date of discharge was October 25, 1971 [herein February 1973]. There being no indication that either party viewed the October 25 [herein February 1973] discharge as anything other than "final," there is certainly no reason for us to now torture this mutual understanding by accepting the bare assertions to the contrary raised by petitioners for the first time before this Court.

Id. at 235 (footnotes omitted).

The Supreme Court did state that the parties may have a contractual understanding that confirmation from higher management of a recommendation for discharge would be considered as the relevant statutory "occurrence," but that is clearly not the case here.[3] In was understood by Rudolph that she was fired. The labor agreement only provided for a contractual ap-

[3] The only possible distinction between this case and *Electrical Workers* is that in *Electrical Workers* the appellants failed to raise this argument in the court of appeals, and raised it for the first time before the Supreme Court. *See International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc., supra*, 429 U.S. at 235 n. 7. However, there still exists no more than "bare assertions" in this case.

peal route. It did not render her discharge provisional.[4] Rudolph was dismissed from her employment in February 1973, and that was the occurrence for purposes of the Title VII limitations period.

Rudolph also makes the allegation that Wagner failed to remedy the discharge during the grievance and arbitration process. This "continuing violation" claim is without merit, as it is simply a restatement of Rudolph's allegation that the February 1973 discharge was not the occurrence for Title VII purposes. "Termination of employment either through discharge or resignation is not a 'continuing' violation. It puts at rest the employment discrimination because the individual is no longer an employee." *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975).

Rudolph's second claim on appeal is that even if the February 1973 discharge was the occurrence for purposes of Title VII, pursuing her grievance in accord with the labor contract tolled the time period for filing with the EEOC. Rudolph argues that *Electrical Workers*, which held to the contrary, should not be applied retroactively to her case.

The standards to be considered in regard to retroactivity were articulated by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The major factors are whether the court ruling in question was of first impression or "clearly foreshadowed," whether the retroactivity will further or retard the purpose of the rule, and whether inequities will result by retroactive application of the rule.[5]

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[4] Indeed, the labor contract between Wagner and the union of which Rudolph was a member considered an employee to be "reinstated" if the employee prevailed in the grievance procedure. Agreement between Wagner and union for the period of April 6, 1970, to April 1, 1973, Art. 3, paragraph 8.

[5] In *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 106-07, the Court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citations omitted.]

Although the discussion in *Electrical Workers* is not articulated as a discussion of the *Chevron* standards, the Supreme Court considers the substance of each of the *Chevron* standards in reaching its decision. Initially the Court notes: "We think that petitioners' arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures under the collective-bargaining contract are virtually foreclosed by our decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975)." *International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc., supra*, 429 U.S. at 236. Although we recognize that these cases occurred after Rudolph's 180 day period for filing with the EEOC had expired, the basis on which this foreshadowing exists is still applicable. The Court in *Electrical Workers* points out that the legislative history of Title VII is quite clear in revealing the congressional intent to "supplement, rather than supplant" existing remedies for employment discrimination. *Id.* at 236, n.8. The Court's ruling in *Electrical Workers* was not a surprise.

At the time of Rudolph's discharge, several courts had dealt directly with the tolling issue herein, and had indicated that the grievance procedure tolls the Title VII filing period.[6] The pri-

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[6] *Moore v. Sunbeam Corp.*, 459 F.2d 811, 826-27 (7th Cir. 1972); *Malone v. North American Rockwell Corp.*, 457 F.2d 779, 781 (9th Cir. 1972); *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 308-09 (5th Cir. 1970); *Culpepper v. Reynolds Metals, Inc.*, 421

mary case holding this was *Culpepper v. Reynolds Metals, Inc.*, 421 F.2d 888 (5th Cir. 1970). However, the only cases Rudolph cites that have occurred in courts within this circuit and upon which her attorney might have relied in deciding that the grievance system would toll the limitations period, are *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972), and *Lowry v. Whitaker Cable Corp.*, 348 F. Supp. 202 (W.D. Mo. 1972), *aff'd*, 472 F.2d 1210 (8th Cir. 1973). Both of these decisions dealt with the question of whether initially filing a complaint with the EEOC served to toll the running of the statutory time period while state proceedings were utilized. This is a sufficiently different issue; it does not provide the "clear past precedent" that *Chevron* mentions.

At the time of Rudolph's discharge, the most Rudolph can claim is that she did not know from existing precedent in this circuit whether the grievance procedure would toll the time period for filing with the EEOC.

Even more importantly, under the facts of this case, is the fact that even when one considers the *Culpepper* line of cases, none of the cases Rudolph relies upon contain language that would have led her to believe that she was prevented from filing her sex discrimination claim with the EEOC. She does not allege that she was under this impression at the time of her discharge.[7]

F.2d 888, 891-92 (5th Cir. 1970). *See Dewey v. Reynolds Metals Co.*, 291 F. Supp. 786, 789 (W.D. Mich. 1969). *See also Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd and remanded, reh. denied*, 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

[7] Rudolph cites *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), as authority upon which her attorney might have relied in believing that she was required to pursue her contract remedies prior to going into federal court. However, the legislative history of Title VII, as discussed in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-60 (1974), negates the applicability of the general rule (as discussed in *Republic Steel*) of using the contract grievance procedure prior to resort to federal court. *Republic Steel Corp. v. Maddox, supra*, 379 U.S. at 652-53.

The *Electrical Workers* Court also discusses this fact in its opinion:

> In no way is this a situation in which a party has "been prevented from asserting" his or her rights, *Burnett v. New York Central R. Co.*, 380 U.S., at 429. There is no assertion that [plaintiff] was "prevented" from filing a charge with the EEOC within [the statutory time period]; indeed, it is conceded and even urged that she could have filed it the following day, had she so wished.

International Union of Electrical Workers, Local 790 v. Robbins & Myers, supra, 429 U.S. at 237 n.10. *See generally id.* at 237-38.

There were no cases that instructed Rudolph not to file her EEOC complaint at that time, and no cases within this circuit indicating that the grievance system tolls the EEOC time period for filing.

The second part of the *Chevron* test is deciding whether retroactive application of *Electrical Workers* will further or retard the purpose of the rule announced in *Electrical Workers*. For example, in *Chevron*, the case in question included the ruling that state law rather than admiralty law applied in an action on a personal injury occurring on a fixed structure on the Outer Continental Shelf. "A primary purpose underlying the absorption of state law as federal law," stated the *Chevron* Court, "was to aid injured employees by affording them comprehensive and familiar remedies." *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 107-08. Because retroactive application of the rule would have imposed a state statute of limitations and consequently deprived the plaintiff of any remedy, retroactive application would not have furthered the purpose of the new rule.

In this case, the Supreme Court held that the grievance procedure will not toll the Title VII limitations filing period. The

purpose of the Electrical Workers decision is to further the legislative intent of the Act: "[T]he contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee[.]' " *International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 236, *quoting from Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 52. " 'Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.' " *Id.* at 236 n.8, *quoting from Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 48-49. Thus, retroactive application is not inconsistent with the purpose of the *Electrical Workers'* rule.

This, of course, leads us to the third of the *Chevron* standards —the equities involved.

The most obvious inequity with which Rudolph would be left, should this court give retroactive effect to *Electrical Workers* is that she would not be able to pursue her sex discrimination claim under Title VII. This is admittedly contrary to the liberal and broad interpretation meant to be given remedial legislation such as Title VII. This same type of inequity resulted in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975), inasmuch as plaintiff therein was barred from filing a section 1981 claim when the Court ruled that filing with the EEOC did not toll the 1981 limitations period. There the Supreme Court stated:

> We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently are actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court.

Id. at 467 n.13.

The *Johnson* language applies to this situation also. We are simply determining whether Rudolph waited too long before filing her Title VII claim. Our decision will deprive her of her Title VII remedy. Yet she did elect to pursue her contractual remedy —a remedy distinct from Title VII provisions—apparently at which time her discrimination claims were considered.[8] As we have already pointed out, Rudolph was never prevented from timely filing her EEOC charge. She chose to await the outcome of her contractual remedy before filing her Title VII claim. We endorsed the rationale of the *Culpepper v. Reynolds Metals, Inc., supra,* court in *Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972), in that time limitations "[are] meant to penalize only those who sleep on their rights and remedies, not one who actively attempts to settle his complaint by following the 'rules of the shop.' " *Id.* at 1252 n.10, *quoting from Culpepper v. Reynolds Metals, Inc., supra,* 421 F.2d at 892. But even though Rudolph followed the rules of the shop in pursuing her contractual remedy, this does not provide a sufficient justification for her "failure to take the minimal steps necessary to preserve each claim independently." *Johnson v. Railway Express Agency, Inc., supra,* 421 U.S. at 466.

By not applying the *Electrical Workers* rule retroactively we would also defeat the purpose of the limitations period, which is to give notice to the employer. Even though Wagner ac-

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[8] The record discloses that Wagner's response to Rudolph's complaint stated "the same issue of alleged sex discrimination presented herein was raised and considered in the arbitration proceedings; * * * this Plaintiff was represented in those proceedings by her union bargaining agent and also by her own retained attorney; * * * the arbitration proceedings were conducted with a high degree of procedural fairness before a distinguished and respected arbitrator having special competence in discrimination cases * * *."

knowledges that Rudolph raised the sex discrimination charges in the grievance procedure, this did not give notice that she planned to pursue her complaint in a Title VII statutory claim. The grievance procedure is an independent remedy; a sex discrimination argument raised in a grievance procedure is not tantamount to the notice required by the Title VII period of limitations.

There is obviously some inequity inherent in whatever choice we make. However, the inequity of leaving Rudolph unable to pursue her Title VII remedy is not so great when one considers that she was never prevented from filing her claim in a timely fashion with the EEOC. Thus, we find the *Chevron* standards to be better served by applying the *Electrical Workers* rule retroactively.

We affirm the district court.

HANSON, Senior District Judge, concurring.

I concur in Judge Stephenson's analysis as it relates to when the alleged unlawful employment practice "occurred" within the meaning of the statute. My purpose in concurring separately is to stress that in rejecting Rudolph's other argument that *International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), should be applied nonretroactively (or prospectively only), I have felt compelled to follow inferences gained from the rationale employed by the Supreme Court in *Electrical Workers*, and have not predicated my conclusion on an independent review of the standards articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

Though the Supreme Court was not faced with the retroactivity question in *Electrical Workers*, I think the clear implication in the language and reasoning used by the Supreme Court in

concluding that pursuit of a contractual grievance procedure does not toll Title VII time limitations suggests that its holdings should be given retroactive effect. The Supreme Court's stress on the clarity of legislative history indicating that Title VII was "designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *Electrical Workers, supra* at 236 n.8, *quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974), and its observation that *Alexander, supra*, and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), "virtually foreclosed" any argument in favor of tolling indicates to me that the Supreme Court would be likely to resolve the first and second components of the *Chevron* test against Rudolph. As Judge Stephenson notes, "[a]lthough the discussion in *Electrical Workers* is not articulated as a discussion of the *Chevron* standards, the Supreme Court considers the substance of each of the *Chevron* standards in reaching its decision." Slip op. at 5, *supra*.

Only because I feel bound by what I can infer from the parallelism between the *Electrical Workers* opinion and the *Chevron* standards do I concur in the conclusion that the holding in *Electrical Workers* should be applied retroactively.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

78-1193 September Term, 1978

Joan Rudolph,
Appellant,
vs.
Wagner Electric Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

December 5, 1978

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

John Rudolph,
Plaintiff,
vs.
Wagner Electric Corporation,
Defendant.

No. 77-0322 C (1).

JUDGMENT

(Filed February 1, 1978)

A memorandum dated this day is hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED that the motion of defendant Wagner Electric for summary judgment be and is sustained.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered for defendant Wagner Electric and against plaintiff.

IT IS FURTHER ORDERED that this cause be and is dismissed with prejudice.

Dated this 1st day of February, 1978.

/s/ J. H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Joan Rudolph,
Plaintiff,
vs.
Wagner Electric Corporation,
Defendant.
No. 77-0322 C (1)

MEMORANDUM

(Filed Feb. 1, 1978)

This matter is before the Court on the motion of defendant Wagner Electric Corporation for summary judgment. For the reasons stated below, defendant's motion will be granted.

This is a suit for declaratory judgment, injunctive relief, and damages to redress an alleged deprivation of rights under Title VII of the Civil Rights Act of 1964 and is instituted pursuant to section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, 78 Stat. 103 (March 24, 1972), Title VII. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§451, 1343, and 1345.

Plaintiff Joan Rudolph (hereinafter "Rudolph") was employed by defendant Wagner Electric Corporation (hereinafter "Wagner") from December 1951 to February 1973. Rudolph filed a union grievance on her discharge in February 1973 with Local 1104, International Union of Electrical, Radio and Machine Workers, AFL-CIO, of which she was a member in good standing. The grievance was arbitrated on December 18 and

20, 1973, and decision upholding the discharge was rendered on April 22, 1974. Rudolph filed a charge of employment discrimination against Wagner on May 5, 1974. On or about May 20, 1974, Rudolph's charge of discrimination was deferred to the Missouri Commission on Human Rights and on May 21, 1974, the Equal Employment Opportunity Commission assumed jurisdiction over Rudolph's charge. On or about January 10, 1977, Rudolph received a "Notice of Right to Sue" from the St. Louis District Office of the Equal Employment Opportunity Commission. Complaint in this case was filed on March 28, 1977, alleging that Rudolph had been deprived of benefits due her as an employee solely because of her sex as a result of discrimination during her employment with Wagner, her discharge from Wagner and Wagner's failing and refusing to take affirmative action to correct the effects of the discriminatory policies and practices alleged.

Wagner asserts that Rudolph has failed to meet the jurisdictional prerequisite to suit under Title VII contained in section 706(e) of the Act, 42 U.S.C., §2000e-5(e):

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ."

The filing of a charge within one hundred and eighty days of the alleged unlawful employment practices is a jurisdictional prerequisite to suit under Title VII. ***United Air Lines, Inc. v. Evans***, — U.S. —, 52 L.Ed.2d 571, 87 S.Ct. 1885 (1977); ***Alexander v. Gardner-Denver Co.***, 415 U.S. 36, at 47 (1974); ***Olson v. Rembrandt Printing Co.***, 511 F.2d 1228 (8th Cir. 1975); ***EEOC v. Missouri Pacific R.R.***, 493 F.2d 71 (8th Cir. 1974). Rudolph alleges Wagner discriminated against her with regard to certain unlawful employment practices during the course of her employment and with regard to her discharge. Rudolph's discharge was in February 1973, and her charge of

employment discrimination was filed on May 15, 1974, fourteen and one-half months after discharge, not within one hundred and eighty days of her discharge by Wagner.

Rudolph also alleges that Wagner discriminated against her by refusing to correct the effects of the discriminatory policies and practices alleged. Discharges are not continuing violations. The date of discharge is the controlling date under the statute, and the charge must be filed in relation to that date. *Olson v. Rembrandt Printing Co.*, supra.

In addition, Rudolph alleges that the pendency of the grievance-arbitration procedure with respect to her discharge tolled the running of the limitations period within which the charges had to be filed with the EEOC. The filing of a grievance under a collective bargaining agreement does not toll the running of the limitations period within which charges must be filed with the EEOC under Title VII of the Civil Rights Act of 1964. *Electrical Workers, Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976).

Plaintiff has failed to satisfy a jurisdictional prerequisite to this suit—the filing of a timely EEOC charge concerning the acts of alleged discrimination on which the suit is based. There is no genuine issue as to the essential facts of the case. Therefore, defendant's motion for summary judgment dismissing complaint will be granted and plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Dated this 1st day of February, 1978.

/s/ J. H. MEREDITH
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1364

JOAN RUDOLPH,
Petitioner,

v.

WAGNER ELECTRIC CORPORATION,
Respondent.

BRIEF

Of Wagner Electric Corporation in Opposition to Granting a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

D. J. SULLIVAN
TIMOTHY L. STALNAKER
LEWIS, RICE, TUCKER, ALLEN & CHUBB
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
Attorneys for Wagner Electric Corporation

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Of Wagner Electric Corporation in Opposition to Granting a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

This Petition for a Writ of Certiorari should be denied as there is absolutely no basis alleged for granting the Writ. There are no "special and important reasons therefor" and the petition does not set forth any of the grounds for Certiorari under Rule 19.

REASONS FOR DENYING THE WRIT

I

None of the Reasons for Granting the Writ Set Forth in Rule 19(1)(b) Apply Here.

Petitioner, in seeking a writ of certiorari, cites none of the reasons listed in Rule 19(1)(b) as warranting review by this Court. The reason is apparent. None of these reasons are applicable to this case. There are no special or important reasons for review by this Court of the decision of the Court of Appeals of the Eighth Circuit in this case.

The Court of Appeals neither decided new questions of federal law not covered in this Court's decision in *Electrical Workers, Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976), nor decided any issue in conflict with other applicable decisions of this Court.

Addressing Petitioner Rudolph's basic contention in the Court of Appeals that an arbitrator's adverse decision on her discharge grievance, not the discharge itself, began the 180-day limitations period for filing her charge of discrimination with the Equal Employment Opportunity Commission, the Court of Appeals stated:

> "This argument has implicitly been rejected by this court, and has specifically been rejected by the Supreme Court in *International Union of Electrical Workers, Local 790 v. Robbins and Myers, Inc.*, 429 US 229, 234-5 (1976).
>
> "Rudolph alleges her fact situation can be distinguished from *Electrical Workers* primarily because Rudolph considered the arbitration decision to be the final disposition, and thus the 'occurrence,' and she did not consider the February 1973 discharge as final. However, this claim amounts to no more than the bare assertion raised by the plaintiffs in *Electrical Workers*." (Appendix to Petition for Certiorari, 2-3; 586 F.2d 90 at 91-92).

The Court of Appeals' decision in this case conflicts with no decision of any other Court of Appeals ruling on either of the questions which Petitioner would present to this Court. The Court of Appeals decisions cited by Petitioner predate this Court's decision in *Electrical Workers*, which resolved those questions.

II

The Basic Issues Which Petitioner Would Present to This Court Were Resolved by This Court's Decision in Electrical Workers, Local 790 v. Robbins and Myers, Inc.

The basic reason which Petitioner does cite for granting the writ is that the issue of whether this Court's *Electrical Workers* decision should be applied retroactively remains unresolved.

This contention cannot be reconciled with this Court's decision there which was applied to the parties in that suit. Nowhere in the Opinion in that case does this Court state or intimate that the decision is to be given prospective effect only.

The factors which are to be considered in determining whether to give decisions only prospective application have been set forth in *Chevron Oil Co. v. Huson*, 404 US 97 (1971). This Court decided that those factors did not dictate such limited application of its *Electrical Workers* decision. The issue has been resolved.

Moreover, the Court of Appeals reviewed the issue itself, applied the factors set forth in *Chevron, supra*, expressly, and concluded that application of this Court's decision in the *Electrical Workers* case to Petitioner Rudolph was warranted, and

that retroactive application better served the *Chevron* standards. (Appendix to Petition for Certiorari, 6-10; 586 F.2d 90 at 93-96).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

D. J. SULLIVAN

TIMOTHY L. STALNAKER
LEWIS, RICE, TUCKER, ALLEN
& CHUBB
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
(314) 231-5833
Attorneys for Wagner
Electric Corporation